

NATIONAL IMPLEMENTATION OF ICC CRIMES

The relationship between national implementation of ICC crimes and the principle of complementarity.

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Abbreviations

ECHR	-	The European Court of Human Rights
EHRC	-	Convention for the Protection of Human Rights and Fundamental Freedoms
ICC	-	International Criminal Court
ICJ	-	International Court of Justice
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia

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1 Introduction

1.1 The topic

It is the relationship between the principle of complementarity and national implementation of ICC crimes as presented by the Rome Statute and relevant national legislation which will be the subject for this paper.

The principle of complementarity is the link connecting the judicial system of the International Criminal Court (the Court or the ICC) to each State Party's national judicial system. This principle gives the national legal system primacy over cases of genocide, crimes against humanity and war crimes¹ (ICC crimes). Cases will only be admissible before the ICC if the States Parties national judicial system is either unwilling or unable to genuinely investigate or prosecute the case.² The core of the complementarity principle is thus the admissibility test determining who should have jurisdiction in a particular case.

The topic of this paper will be raised by analysing the relationship from two angles.

The first angle is how national implementations impact the complementarity principle as reflected through the admissibility assessment. The obvious factor is that different national implementation strategies will lead to different results in the admissibility test. But this angle raises some important questions: What level of implementation is required if the state wishes to maintain its jurisdiction and prosecute the case at a national level? And

¹ Article 5, the Statute. Article 5(1)(d) also gives the Court jurisdiction over cases concerning crimes of aggression. This crime has however as of yet not been given a definition, and will therefore not be dealt with in this paper.

² Article 17 (1) of the Statute.

furthermore, can the state maintain substantive jurisdiction over the ICC crimes even if it does not initiate an implement process at all?

The second angle is how the principle of complementarity impacts the national implementation processes. The complementary nature of the ICC was established as states wanted to secure their national sovereignty.³ This can best be done through securing substantive criminal jurisdiction over the ICC crimes. Complementarity is thus a significant influence for states when they decide to implement the ICC crimes into national legislation. This angle does, however, also raise an important question: Since the complementary nature of the Court postulates an active prosecuting role of the States Parties, does it in fact imply an obligation to implement the ICC crimes?

The focus of the paper will be on states which have ratified the Rome Statute and wish to prosecute and punish offenders of international crimes. The purpose of the paper is to show whether these states have to change their national legislation in order to do so.

1.2 Limitation

The paper will apply one important limitation when analysing the described topic.

Whether a case is admissible before the ICC will vary on a number of factors as the admissibility test involves a very complex assessment. This paper will isolate one factor of the admissibility test, namely the *criminal substantive law*⁴ of States Parties as such.

Other questions in regards to implementing the Statute such as procedural aspects will only be addressed if it will highlight a specific problem or solution.

³ Cassese (2003) page 351

⁴ 'Substantive law' being understood as the crimes defined in Articles 6-8 of the Statute.

Some minor limitations will be applied for some parts of the paper. They will be introduced where relevant.

1.3 Further structure

Part 2 presents the method of this paper and explains how the problems will be addressed. It will also explore the applicable law for interpreting the Rome Statute in addition to raising some special problems to these sources in relation to the Statute

Part 3 briefly examines the principle of complementarity and introduces the admissibility test set forth by the principle in articles 17 and 20 (3) of the Statute.

Part 4 identifies the different strategies states can choose when implementing the ICC crimes into national legislation, namely i) to implement the same definitions as the Rome Statute contains, ii) to implement a broader definition than what is included in the Statute, iii) to implement a narrower definition than what is included in the Statute and finally iv) not to implement the ICC crimes at all. It also analyses how these implementation strategies impact the national prosecution of international crimes, and thus presents us with two scenarios which the States Parties may experience if they decide to implement a narrower definition than included in the Statute, or by not implementing at all: A) *the prosecute for ordinary crimes scenario*, and B) *the impossible to prosecute scenario*.⁵

Part 5 analyses the impact national implementations of ICC crimes will have upon the admissibility before the Court. This will be illustrated through applying the same admissibility test as the Court eventually will have to do, upon the different scenarios of national prosecution of the ICC crimes as presented in part 4.

⁵ Terracino (2007)

Part 6 analyses the impact the complementary nature of the ICC has upon the process of national implementation. First, by discussing how the principle of complementarity acts as an incentive for states to implement the ICC crimes. Then by assessing whether complementarity provides a legal obligation for States Parties to implement the ICC crimes. The scenarios presented in part 4 will be relevant as a basis for this part also.

It must be noted that despite the fact that part 5 and part 6 discuss different bases, the separation is an artificial one. The impact complementarity has upon national implementation of ICC crimes is essential to the impact national implementation of ICC crimes has upon admissibility before the ICC and *vice versa*. In fact, they explain each other and belong together as one subject. When I still choose to discuss them separately in this paper, it is because both sides deserve to be highlighted and this is done more effectively through this separation. This strategy has, however, forced me to discuss subjects prior to where they otherwise would be more naturally dealt with in order to make the paper coherent.

2 Method of the paper and applicable law

2.1 Method of the paper

The discussion of this paper will primarily be based upon an analysis of the preambular clauses and article 1 of the Statute where the principle of complementarity is set out and articles 17 and 20 of the Statute where the principle is put into effect. While the Statute exists in six equally authentic versions, this paper will only refer to the English version.

The relevant rules of the Statute will be interpreted according to the principles set forth by article 21 of the Statute as well as the general principles of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention). These are the same sources and principles as the Court will apply when determining the admissibility of a case pursuant to articles 17 and 20 of the Statute. This is especially important in part 5 of this paper where I am going to apply the admissibility test for certain scenarios, and thus give my opinion of what conclusion the Court should reach when equal scenarios reach the Court. These are also the same principles as must be applied when establishing what obligations a States Party has incurred by ratifying the Statute in part 6.2.

2.2 Applicable law

International criminal law is a subset of international law, and its sources are therefore those of international law. These are usually considered to be those enumerated in 38 (1) of the Statute of the International Court of Justice. All the ad hoc tribunals have used the sources of law as provided there.⁶ As for the ICC, however, the Statute contains its own set of sources for the Court to apply in article 21.

⁶ Cryer, (2007 A) page 6

Article 21 lists the applicable law in a hierarchical order starting with the “Statute, elements of crimes and its rules on procedure of evidence”.⁷ The Statute exists in six language versions, which are all authoritative for the purpose of interpretation.⁸ In the *Mavrommatis Palestine Concession Case* the International Court of Justice (ICJ) had to interpret the phrases ‘public control’ and ‘contrôle public’ in the French and English authentic languages texts of the Palestine Mandate. The Court said:

“Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties.”⁹

The same would apply if there was a discrepancy in the meaning of the wording of the Statutes.

As written instruments of international law, the Statute must be interpreted in accordance with articles 31-33 of the Vienna Convention. Article 5 of this convention provides that it “applies to any treaty which is the constituent instrument of an international organization”. Furthermore, the Statute’s article 21 (1) (b) provides that the second tier in the hierarchy of applicable law is “applicable treaties and the principles and rules of international law”. The principles of treaty interpretation set forth by the Vienna Convention will therefore be relevant for both the ICC itself and the States Parties.¹⁰

Articles 31 (1) of the Vienna Convention lists the three essential aspects of treaty interpretation: the interpretation shall at one time be literal (“the ordinary meaning”), contextual (“in their context”) and teleological (“in light of its object and purpose”).¹¹ The

⁷ Article 21 (1) (a) cf. article 51 (5) of the Statute.

⁸ Article 128 of the Statute

⁹ Evans (2003)

¹⁰ Stigen, (2005) page 16

¹¹ Stigen (2005) page 16.

preambular clauses will be relevant when establishing both the context and the object of the treaty pursuant to article 31 (2) of the Vienna Conventions.

Article 32 of the Vienna Convention lists the preparatory work as a “supplementary means of interpretation”. Such documents must, however, be used carefully as the Rome Statute was made through a process including almost all the states of the world, but at different levels, and there is no authorised collection of the preparatory work.

The third tier in the hierarchy of applicable law is, according to the Statute’s article 21 (1) (c), “general principles of law derived (...) from national law”. This is very important as the complementarity regime of ICC implies that the majority of cases will be prosecuted by the States Parties and never come before the Court. The Court must, however, be very cautious when applying national sources, as international law in domestic cases will be affected by the national method of law.

The Statute then goes on to include its previous decisions in the Statute’s article 21 (2) as applicable law. The ICC is not, however, bound by its previous decisions.¹² As of today, the ICC has yet to pronounce its first decision applying the complementarity principle.¹³ However, article 21 (3) states that the applicable sources of law, will only be relevant as long as it is consistent with the internationally recognized human rights. This will render the jurisprudence from international human rights courts applicable when interpreting the Statute. I will thus apply jurisprudence in related fields of international law, especially human rights law.

Finally, the establishment of the International Criminal Court has caused the publication of a considerable amount of books and articles. Some of these writings deal with the principle of complementarity, and several has touched upon the problems discussed in this paper. Also, several articles deal with the national implementation of the ICC crimes, although

¹² It has no equivalent to the common law principle of *stare decisis*. Cryer (2007 A) page 9

¹³ The first case before the ICC will commence 31st of March 2008, when Mr. Thomas Lubanga Dyilo will be prosecuted. <http://www.icc-cpi.int/press/pressreleases/301.html>

few of them touch upon the problems discussed in this paper. The scholars do, however, differ on various topics which I will discuss in this paper.

Writings of scholars are not, in themselves, sources of international criminal law, and especially not in areas concerning the principle of legality of crimes.¹⁴ Still, arguments presented with valid reasoning must always be considered before coming to a conclusion.

¹⁴ Cryer (2007 A) page 9.

3 The principle of complementarity

I will now briefly present the principle of complementarity as a fair knowledge of it is imperative to for the understanding of the rest of the paper.

This ‘principle of complementarity’ of the ICC is emphasised and established through paragraph 10 of the preamble and article 1 of the Statute while it is put into effect by article 17. The complementary nature of the Court must also be seen in relation to article 20 (3) of the Statute which deals with the *ne bis in idem*¹⁵ principle.

Article 17 of the Statute renders a case, which is being or has been investigated and/or prosecuted by a state with jurisdiction, inadmissible before the Court unless the state is either unwilling or unable to proceed genuinely.¹⁶ Hence national legal system hold primacy over cases of ICC crimes, but the national proceedings need to pass the admissibility test pursuant to article 17. Only if the State fails this admissibility test, will the Court be able to exercise its jurisdiction over the case.

Thus, the admissibility test is the core of the complementarity principle. It is however, just one of three tests a case will need to pass in order for the ICC to be able to preside over the case. The first requirement is that the case falls within the jurisdiction of the Statute defined in article 5 and article 12 of the Statute as one of the aforementioned ICC crimes. The second requirement is that of admissibility¹⁷ while the third is the issue of prosecutorial discretion regulated in article 53 of the Statute.¹⁸

¹⁵ Also referred to as ‘double jeopardy’. A principle established to prevent the same person from being prosecuted twice for the same conduct. I will analyse this more thoroughly in part 5.4.

¹⁶ Article 17 (1) (a) of the Statute.

¹⁷ I will apply the admissibility test for certain scenarios in part 5, and will therefore not go into further detail on the subject at the present stage.

¹⁸ This thesis will only look into the complementary requirement.

Under the complementarity principle, international proceedings will co-exist, rather than pre-empt, with national mechanism already in existence.¹⁹ Unlike its predecessors, the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR),²⁰ the ICC preserves national criminal jurisdiction as primary, and only supplement the domestic proceedings.

If all States strive to avoid failing the admissibility test, which depends upon the willingness and ability of a State, the complementary nature of the Court could in fact lead to no cases being admissible before the Court. In such a situation, the States would, in principle, maintain their sovereignty as all the cases were handled by national courts.²¹

Nevertheless, pursuant to article 17 of the Statute, a State Party has accepted that unless it provides legal jurisdiction over the ICC crimes within its own judicial system, and no other State with jurisdiction is willing or able to genuinely investigate or prosecute the case, ICC crimes committed on its territory and by its citizens will be prosecuted by the Court.

Most states that have ratified the Statute have thus either enacted some form of implementation of the ICC crimes, or have some draft to implement these crimes into their national legislation pending in their legislature process.

¹⁹ Bekou (2006)

²⁰ See article 9 (2) of the ICTY statute and article 8 (2) of the ICTR statute.

²¹ Holmes (2002). However, the history, both long-term and short-term, indicates that there is a need for a permanent international criminal court. See for instance the four current situations before the Court.

4 National Implementation of ICC Crimes

In this part I will show to what extent, and how, states have implemented the ICC crimes. I will also show what scenarios will arise when a state wishes to institute national proceedings against alleged perpetrators of ICC crimes according to its chosen implementation strategy.

The national definitions of the implemented crimes will have an impact on the states own ability to carry out prosecutions for the ICC crimes. In turn, these will also have an impact on the result of the complementarity assessment as it will influence the admissibility test. However, it must be noted that there is not necessarily a connection between a lacking implementation of ICC crimes, and the admissibility before the Court. States Parties could hold the most meticulous national criminal systems, and still not implement the ICC crimes. Whether this would make the case admissible before the Court would still vary on a number of issues.²²

Prior to the drafting of the Rome Statute in 1998, few states had labelled criminal conduct in the penal codes with the terms ‘genocide’, ‘crimes against humanity’ and ‘war crimes’. Furthermore, the few states that had defined these crimes in their penal provisions had defined them individually so there was little uniformity.

Today, 73 of the 105 states that have ratified the Statute have either implemented, or begun implementing some parts of the Statute into their domestic legislation. Of these states, all but Mexico, Japan, Austria, Latvia and Romania have included the substantive law in their implantation process.²³

²² The relationship between implemented ICC crimes and national prosecution will be raised in this part of the paper, while part 5 will discuss the relationship between national implementation and admissibility before the Court.

²³ Amnesty International (2006)

Implementing internationally defined crimes into national legislation is, however, not an easy task. States will have to make the implemented legislation compatible with their sometimes complex national criminal justice system while also making their already existing legislation compatible with the Statute. The implementation process might also be further complicated by the political fluctuations of a state. Italy is one example of a state that has not enacted its implementing legislation yet due to both constitutional issues as well as political concerns.²⁴

States have therefore found it necessary to take individual approaches in their implementation process. Only by doing this will they be able to take into account the particularities of their own national judicial system and hence, not disrupt the procedures that are already familiar to their populations and court officials. The final legislation will therefore still deviate from State Party to State Party. It is, however, believed that the definitions of 'war crimes', 'genocide' and 'crimes against humanity' provided for in the Statute will ultimately lead to a more uniform set of definitions for all states.

Studies into national implementation processes show that some States Parties have not yet begun implementing the ICC crimes into their national legislation. Furthermore, some of the states that have implemented the ICC crimes into their national legislation have defined the crimes with differently definitions from the Statute. There are examples of states that have made the definitions both broader and narrower.

In the following presentation I will analyse the four possible implementation strategies states can choose: Either they implement the same definition of ICC crimes as provided for in the Statute (4.1); they implement a definition of the ICC crimes in their national legislation which is broader than the provided for in the Statute (4.2); they implement a definition of the ICC crimes in their legislation which is narrower than the one provided for in the Statute (4.3); or they decide not to implement the ICC crimes at all.

²⁴ Marco Roscini (2007)

As I will show through my examples, a state may of course implement a broader definition for one ICC crime and a narrower definition for another ICC crime or even define the same ICC crime broader in one area and narrower in the other.

4.1 The same definition of ICC crimes in domestic law

Several States Parties have criminalized the ICC crimes in their domestic legislation in the identical terms as provided by the Statute; either verbatim in their own penal code (e.g. Belgium²⁵ and the Netherlands²⁶), or by including the Statute or parts of it in their implementing legislation as annexes or schedules (e.g. United Kingdom²⁷, Australia²⁸ and South Africa²⁹).

States may only prosecute perpetrators in their national judicial systems to the extent they hold jurisdiction. The boundaries for a state's substantive jurisdiction may vary according to their judicial system. However, the absolute majority of states today base their criminal law on the doctrine of strict legality of crimes,³⁰ meaning that that a person may only be held criminally liable if, at the moment he committed a certain act, the act was regarded as a criminal offences in written law, namely legislation enacted by Parliament, and not in customary rules or secondary legislation such as a treaty.³¹ The state's substantive jurisdiction is therefore limited to what it regards as criminal offences (usually in the state's penal code) before the act is committed. It is debated whether this principle is a part of international customary criminal law, but it is often written in the constitution of a state. Section 96 of the Norwegian Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) article 7-1 both embodies this principle.

²⁵ Vandermeersch, (2007)

²⁶ Sluiter (2004)

²⁷ Cryer (2007 B)

²⁸ Boas (2004)

²⁹ du Plessis (2007)

³⁰ I will assume that all States Parties apply this principle for the rest of the paper.

³¹ Cassese (2003) Page 141. The principle is also known as *nullum crimen sine lege*

The European Court of Human Rights has issued several judgements on this principle after it first established that it was embodied in the EHRC article 7-1 in the Kokkinakis case.³² This principle has through the ECHR's jurisprudence been interpreted so that the state can only convict a person if, "the individual could know from the wording of the relevant provision what acts and omissions would make him criminally liable".³³ In other words, the offences must be clearly defined by relevant law.

Hence, states which apply the principle of strict legality of crimes will only hold substantive jurisdiction to prosecute and punish the perpetrator if they have criminalized the act in its domestic legislation. The same definition of the ICC crimes in domestic law and in the Statute will therefore, in principle, not pose any difficulty to national prosecutions as the state would prosecute for the same crime as the ICC would have had. This is a desirable situation, but, as I will come back to in part 5, it does not necessarily reflect the willingness of the state to genuinely investigate or prosecute in a particular case. Also cases prosecuted by a States Party which has implemented the ICC crimes word for word, might therefore be admissible before the Court pursuant to article 17 of the Statute.

Furthermore, when employing the international crimes in a trial, the national courts may interpret the terms more broadly or more narrowly than what the International Criminal Court and other states' courts do, even if the definitions are the same.

One example of where the definition in practice could become narrower or broader is in England and Wales where the UK ICC Act Section 50 (4) provides that the ICC Statute "shall be construed subject to" British treaty practice. In fact, Section 50 (5) of the same act seems to mandate that, while British courts should take decisions made by the ICC "into account", they should nevertheless give preference to reservations or declarations made by the United Kingdom. Furthermore, Section 56 (1) of the UK ICC Act provides that "in

³² ECHR case of Kokkinakis v. Greece 25. May 1993 para. 52

³³ ECHR case of Achour v. France, 29. March 2006, para 41.

determining whether an offence under this part has been committed, the Court shall apply the principles of the law of England and Wales”.³⁴ These injunctions may lead to divergent results in British courts as opposed to the ICC. Other States Parties might have similar provisions.

Part 4.2 and 4.3 of this Paper will explore the possible consequences for national prosecutions as a result of defining a crime broader or more restrictive than provided for in the Statute. These situations will also include where a state interprets its definitions broader or more restrictively.

4.2 A broader definition of ICC crimes in domestic law

When states define the ICC crimes in broader terms than the Rome Statute, this might be because the state in question unsuccessfully advocated for that act to be included in the Statute during the Rome Conference.

Studies into national implementation of ICC crimes have shown that especially war crimes have been given broader definitions in national legislation compared to the Statute.³⁵ One such example is Belgium which has included several definitions of war crimes that are broader than those in the Rome Statute. This includes omitting one requirement that exists in the Statute, namely that the crime of physical mutilation and medical and scientific experiments must cause death; they only need to compromise health.³⁶ Another example is that several states have included the act of inflicting starvation on civilian populations as a method of warfare in non-international armed conflicts as a war crime in their enacted or draft implementation.³⁷

³⁴ Cryer (2007 B)

³⁵ Amnesty International (2004)

³⁶ Amnesty International (2004)

³⁷ Terracino (2007)

There are also examples of broader definitions of the other crimes. The Democratic Republic of Congo (DRC) has adopted a broader definition of crimes against humanity compared to article 7 of the Statute. The DRC defines apartheid as institutionalised oppression and domination not just on racial grounds, but also on political, national, ethnic, cultural, religious, sexist and other grounds. Hence, several more conducts will constitute a violation of crimes against humanity in their national judicial system.³⁸

An example of a broader definition of genocide is found in Costa Rica which has included ‘political groups’ to the list of protected groups in its definition for genocide.³⁹ Peru has also made its definition of genocide broader by including ‘social groups’ to its list of protected groups.⁴⁰

Naturally, a broader definition of genocide, crimes against humanity or war crimes in the domestic legislation implies that an act that would not constitute a crime under the Statute may amount to a crime in the national context. It is the sovereign prerogative of every state to enact whatever criminal laws it consider appropriate, consistently with international human rights standards, and considering the fact that the ICC crimes were diluted during the negotiations,⁴¹ a broader definition of international crimes in domestic legislation should largely be considered welcome.⁴²

4.3 A restrictive definition of ICC crimes in domestic law

³⁸ Amnesty International (2004)

³⁹ Relva (2003)

⁴⁰ Relva (2003)

⁴¹ Terracino (2007)

⁴² However, where States Parties introduce universal jurisdiction to their judicial system, a broader implemented legislation might compromise the principle of legality as well as other States sovereignty. The question of universal jurisdiction, however, falls outside the definition of this paper and will not be dealt with any further.

Some States Parties have implemented the ICC crimes, but in the process decided to define the crimes in a 'weaker' form. They have thus established a more restrictive definition of the crimes than what the Statute has established.

One example is the Portuguese implementation of genocide. To cause "serious bodily or mental harm to members of the group" is according to article 6 b) of the Statute an act of genocide. This act has been omitted in the Portuguese provision.⁴³

Restrictive definitions of international crimes in domestic law may also occur in situations where states, prior to the drafting of the Statute, had criminalized behaviour as either 'genocide', 'war crimes' or 'crimes against humanity'. If these definitions, which have been maintained, are narrower than the ones found in the Statute, the ICC crimes will be more restrictively defined.

One example of this is France where the current definition of 'crimes against humanity' under article 212-1 of its Criminal Code omits the acts of extermination, imprisonment, severe deprivation of physical liberty, rape, sexual crimes, persecution and apartheid, all of which are included under the ICC Statute. France is, however currently in the process of implementing these mentioned acts in their penal code to solve this discrepancy.⁴⁴

Another example of a more restrictive definition of the ICC crimes in national legislation is the situation in Bolivia, Guatemala and Peru where the current definitions of genocide do not protect 'racial groups'.⁴⁵

A restrictive definition does not necessarily cause difficulty in the national proceedings. As long as the act committed by the perpetrator falls within the definition of the international crime contained in the national legislation, the state is able to prosecute regardless of the restrictive definition. If, however, a state wishes to prosecute an act falling within the

⁴³ Amnesty International (2004)

⁴⁴ Terracino (2007)

⁴⁵ Relva (2003)

definition of an ICC Crime as defined in the Statute, but outside the definition of the same crime in the national legislation, the principle of legality of crimes prevents the State from prosecuting for the international crime. The state will then be faced with one of two situations: either the state can prosecute for an 'ordinary crime' which is violated, or the conduct is not criminalized at all and it is impossible for the state to prosecute. I will present these scenarios in the following under sub-sections A) and B). I will also use these scenarios throughout the remainder of the paper as they serve to illustrate the relationship between national implementation of ICC crimes and the principle of complementarity from both angles.

A. Prosecute for ordinary crimes

The scenario where the state prosecutes for an ordinary crime instead of 'genocide', 'war crimes' or 'crimes against humanity' may arise in two slightly different situations. The first is where the state decides to prosecute for an ordinary crime instead of not prosecuting at all. The second situation where this scenario may arise is where a prosecution for an international crime is carried out, but due to the more restrictive definition in the domestic legislation, the accused is found innocent of the ICC crime, but guilty of an ordinary crime.

An example here: if Portugal prosecutes a person for having caused serious bodily harm to members of a religious group with the intent to destroy the group. It may find that while the crime would amount to genocide under the Rome Statute, it falls outside the Portuguese definition of genocide. The Portuguese courts may instead find the accused guilty of assault and battery.

The essential trait of this scenario is that while the conduct described in the ICC crime is criminalized nationally, it is criminalized under a different label with all that might include, such as lower punishment, less stigmatic, the criminal liability is limited in time etc.

It is worth mentioning that the same scenario may arise in other ways also. There could, for example, be situations where a state's prosecutor decides to prosecute for the ordinary crime rather than the adequately implemented ICC crime, and thus render the court unable to convict for the ICC crime. The prosecutor could decide to do this due to procedural concerns such as problems achieving the required standard of proof. These situations will, however, not arise due to the state's choice of implementation strategy as they apply for all prosecution, and falls outside the scope of this paper.

B. Impossible to prosecute

In the scenario where it is impossible to prosecute, the act committed by the alleged perpetrator is not criminalized at all in the state's national legislation. As the principle of legality grants a state the opportunity to prosecute and punish the perpetrator of a particular act which is clearly criminalized, it equally prevents a national court from punishing a person for a conduct which was not criminalized at the time the act was committed. The states which encounter this scenario will therefore decide not to prosecute for the accused crime.

This scenario may arise if France faces a situation where a person has transported or transferred civilians. This is a conduct which fall under the definition of war crimes in the Statute's article 8 (2) (a) (vii), but is not included as a war crime in the current French legislation.⁴⁶

It is important to note, for future references in this paper, that this scenario postulates that the state has carried out a thorough and genuine investigation into the particular case and wishes to prosecute the alleged perpetrator. The only reason it does not prosecute is that it lacks substantive jurisdiction, due to its restrictive definition of the ICC crimes in its substantive law. This scenario must therefore be kept separate from a scenario where the

⁴⁶ Terracino (2007)

state remains completely inactive (with or without either ordinary crimes or ICC crimes in its legislation), which will impact the admissibility assessment differently.

4.4 No definition of ICC crimes in domestic law

There are still a number of States Parties which have not yet implemented the ICC crimes into their national legislation. A state with no definition of international crimes in its national criminal law wishing to prosecute such crimes will face the same two scenarios mentioned earlier.

A. Prosecute for ordinary crimes

The first, and most probable, scenario that a state with no definition of the ICC crimes in its national legislation may face, is the scenario where the state prosecutes for an ordinary crime instead of ‘genocide’, ‘war crimes’ or ‘crimes against humanity’.

As the state has not implemented the ICC crimes in its national legislation, it may only prosecute the accused for ordinary crimes. For example, Norway does not define genocide in its internal laws, but it could instead prosecute a person for the act of murder which is criminalized under Section 233 of the Norwegian Criminal Code.

B. Impossible to prosecute

Even if the state wants to prosecute, it may have to declare an impossibility to prosecute due to the absence of necessary national legislation and thus lacking jurisdiction. It is hard to ascertain when this scenario will arise as there is little or no jurisprudence on the area.

It is, however, hard to imagine that all States Parties will have an ordinary crime in their legislation which cover all the conducts defined as ‘war crimes’ in article 8 of the Statute.

For example, the acts of making improper use of the military uniform of the enemy, declaring that no quarter will be given, employing poisonous weapons and using children in hostilities in an international armed conflict are all considered war crimes by the Statute. Unless states have criminalized such conduct in an ordinary crime, the state will find it impossible to prosecute and fall under this scenario.

That being said, the case will only be admissible before the ICC if it holds ‘sufficient gravity’.⁴⁷ So a violation of one of these ICC crimes may in fact fall within the jurisdiction of the Court, and still not be considered admissible before the Court regardless of the state’s willingness and ability to prosecute.

I will employ these scenarios in part 5 and 6 when determining the impact national implementation has upon the admissibility test and the impact complementarity has upon the process of national implementation respectively.

⁴⁷ Article 17 (1) (d) of the Statute. I will not discuss this part of the admissibility assessment later in the paper.

5 The Impact of National Implementation on Complementarity

In the previous part I presented different strategies for implementing the ICC crimes. I will now look into the significance of these various forms of implementation and non-implementation with regard to the question of admissibility.

I will do this by applying the admissibility test as provided by article 17 and 20 (3) of the Statute upon the different scenarios presented in part 4. This will show the national implementation of ICC crimes impact the result of a complementarity assessment.

Article 17 (1) reads as follows:

1. *Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
 - (a) *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
 - (b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
 - (c) *The person concerned has already been tried for the conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*
 - (d) *The case is not of sufficient gravity to justify further action by the Court.*

By applying the admissibility test upon the scenarios presented in both part 4.3 and 4.4 (the scenario where states prosecute for ordinary crimes and the scenario where it is impossible for the state to prosecute), I will be able to see how lacking implementation impacts the admissibility assessment. Adequate implementation as presented in 4.1 and 4.2 will, as such, not cause any problems with the admissibility assessment. These implementation strategies will thus not be dealt with further in this paper.

Applying the admissibility test upon the scenario where the state finds it impossible to prosecute will show if a case which has been investigated genuinely, but not prosecuted due to the domestic absence of a criminal definition, is admissible before the Court.

Applying the admissibility test upon the scenario where the state prosecutes for an ordinary crime will show if a case which has been prosecuted, but not as an ICC crime in the national judicial system, is admissible before the Court. This assessment will also show whether it would violate the principle of *ne bis in idem* as provided for in article 20(3) to admit a case before the Court, if a state has prosecuted and convicted or acquitted the perpetrator, but for an ordinary crime instead of an international crime.

Article 17 is constructed so that it provides a number of inadmissibility criteria, meaning that only situations covered by the exceptions expressly listed in article 17 can be admitted before the Court. This approach contrasts the practice of other international courts⁴⁸, and has the direct effect that it is the state that has to challenge the admissibility of a case. In other international courts, the general rule is that it is up to the party bringing the claim to prove that the claim meets the admissibility criteria.⁴⁹ However, the ICC is able to admit a case and subsequently the burden is on the state challenging the admissibility of the case to prove that the case falls under one of the inadmissibility grounds enlisted under article 17. The burden of proof will then be turned to the ICC prosecutor to prove that the case does

⁴⁸ See for example the admissibility criteria of the ECHR Art 35.

⁴⁹ The Prosecutor must always assess the admissibility *ex officio*, and in some situations the prosecutor will have to demonstrate the admissibility to the Pre-Trial Chamber.

not fall under any of the exceptions contained in the article. The burden of proof may be turned if the state does not comply with the prosecutors request for information.

In applying the admissibility test my discussion will be based on the fact that the hypothetical case holds the ‘sufficient gravity’ as required by article 17 (1) (d). The focus of the analysis will therefore be on the issues reflected in articles 17 (1) (a), (b) and (c) and 20 (3).

As article 17 (1) exhaustively lists the inadmissibility grounds, any other circumstance will mean that the case is admissible. We can thus safely conclude that a case will always be admissible before the ICC if:

- (i) the state that has jurisdiction over the case is unable or unwilling to genuinely investigate or prosecute;
- (ii) the state has investigated the case, but due to its unwillingness or inability has decided not to prosecute the alleged perpetrator or;
- (iii) the alleged perpetrator has already been tried by another court for the same conduct subject to the exceptions provided in article 20 (3).

These are the explicit exceptions from the inadmissibility criteria listed in article 17 (1). From these three assumptions we are able to extract four central concepts which are central to the admissibility test and the complementary nature of the Court. These are: (i) genuine proceedings; (ii) unwillingness; (iii) inability and (iv) *ne bis in idem*. I will apply them in the following as they set the standards of the admissibility assessment

I will also note that a case referred to the Court where the State with jurisdiction has remained completely inactive will always be admissible before the Court regardless of the further assessment of ‘unwillingness’ and ‘inability’.⁵⁰ The situation of national inaction does not, however, derive from the national implementation of ICC crimes and thus falls

⁵⁰ Stigen (205) page 149-151

outside the scope of this paper. The admissibility test will only be applied if there is a conflict of jurisdictions.⁵¹ National inactivity will not constitute such a conflict while the two scenarios will.

5.1 Genuine proceedings

The complementarity principle requires that states investigate and prosecute any particular case ‘genuinely’ to prevent the ICC from taking over the case. ‘Genuinely’ is the key determining factor for establishing inadmissibility as there will be no need for the Court to step in as long as genuine proceedings are taking place as opposed to *any* proceeding. Nor will the Court be able to admit a case which is investigated or prosecuted genuinely. It is therefore as much a limitation upon the exercise of the ICC as it is a requirement for the States Parties. ‘Genuinely’ is however not defined in the Statute.

A variance in different states criminal proceedings must be acknowledged. The complementarity principle therefore grants states a considerable margin of appreciation as to how they carry out their proceedings.⁵² The term ‘genuine’ qualifies national proceedings as objectively as possible, and it was chosen with the intent to avoid subjective assessments of national proceedings that would result in lowering the threshold for the admissibility of a case by the ICC.⁵³

However, the inadmissibility test will never solely depend upon whether the investigation or prosecution is carried out genuinely. In fact, the admissibility test will be on the basis of the unwillingness or inability of the state to carry out genuine proceedings. In article 17, the ‘genuinely’ criterion is inextricably attached to the unwillingness and inability criteria. Hence, the standard of ‘genuineness’ of the proceedings must be interpreted in relation to

⁵¹ Holmes (2002) page 673.

⁵² Stigen (2005) page 106

⁵³ Terracino (2007)

‘unwillingness’ and ‘inability’. Once unwillingness or inability of a state to investigate or prosecute is established, the non-genuineness of the proceedings will follow.

Pursuant to article 17, the non-genuineness can therefore only be ascertained after having determined either inability or unwillingness. I will therefore move on to analyse the notions of ‘unwillingness’ and ‘inability’ in order to determine whether the scenarios previously discussed amount to a non-genuine investigation or prosecution.

5.2 Unwillingness

A definition⁵⁴ of ‘unwillingness’ is provided in article 17 (2) which lists up three factors. The occurrence of one of these factors will imply that the state is unwilling to genuinely investigate or prosecute the alleged perpetrator. All the conditions require an intent from the state to shield the accused perpetrator. To prove a national intent is very difficult, and the criteria has thus been criticised for setting too high standards. I will, however, not be impossible, and legal theory has suggested that we should look for a “sham trial” when establishing admissibility on this criterion.⁵⁵

Article 17 (2) reads as follows:

2. *In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*

⁵⁴ The Statute does not call article 17 (2) a definition, but the overriding consensus among scholars seem to be that the list of factors in 17 (2) is exhaustive. See Stigen (2005) page 116-117 with further references. If the list is exhaustive, it will also work as a definition. Holmes (2002) does not see this as a definition, but rather three quite broad alternative conditions.

⁵⁵ Holmes (2002)

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The first situation which is stipulated under subparagraph (a) refers to investigations or proceedings conducted for the purpose of shielding the alleged perpetrator. The second situation which is stipulated under subparagraph (b) deals with proceedings which have been unjustifiably delayed, where the delay is inconsistent with an intent to bring the alleged perpetrator to justice. The third situation which is stipulated under subparagraph (c) concerns proceedings that are not being conducted independently or impartially when this is inconsistent with an intent to bring the alleged perpetrator to justice.

Article 17 (1) and 19 (1) state that it is the Court itself that determines whether a given case is admissible. When the ICC determines the unwillingness of a state to genuinely prosecute, the Court passes a judgement on national judicial systems and proceedings. Establishing unwillingness will never be an easy task, and it might be politically sensitive as the determination of the Court will amount to an accusation against the state in question. Article 17 (2) was introduced to address the concern that the ‘unwillingness’ term was too subjective and might lead to arbitrary decisions by the Court. The factors stated in article 17 (2) are intended to add some objectivity to the decision.

Regarding the two scenarios presented in part 4, namely the scenario where it is impossible to prosecute and the scenario where a state prosecutes for an ordinary crime, the unwillingness criterion must be examined on two levels.

On the first level, it could be argued that because a state has not implemented the ICC crimes adequately into their national legislation, this alone would constitute, or at least indicate, unwillingness to genuinely investigate or prosecute. The reasoning would be that if the state has not criminalized conduct amounting to an international crime, there has not been sufficient will within the state. The unwillingness would, in other words, occur at the implementation (or non-implementation) stage.

This view must be dismissed for several reasons. First of all, article 17 (1) and (2) refer to national investigations and prosecutions. It is at that phase and not before that the Court has to analyse whether there is an unwillingness on behalf of the state. Furthermore, article 17 (2) provides that the Court shall “determine unwillingness in a particular case”. This clearly means that the Court has to determine unwillingness in the specific case. It can not establish that a state has an unwillingness to genuinely investigate or prosecute in broader terms.

The rationale behind this is that the term ‘unwillingness’ in article 17 is reserved for a qualified degree of unwillingness. Only in situations where a state is positively determined to shield the *particular* perpetrator will the term come to use.⁵⁶ Even if the Court finds a general unwillingness with respect to a specific state, it will still have to look for evidence of unwillingness in every particular case. This is an important feature of the admissibility regime.⁵⁷

⁵⁶ Stigen (2005) page 114

⁵⁷ Terracino (2007)

A second reason why this first assertion of unwillingness cannot be accepted is that the process of national implementation of international crimes is complex and necessarily varies from state to state. There might be a number of reasons, including legal traditions and political considerations, as to why a state has not implemented the ICC crimes at all, or in a weaker form. To conclude automatically that a state is unwilling to bring the perpetrator of an international crime to justice would thus be wrong.

We must therefore move on to the second level of analysis, and study whether the scenarios where it is impossible for the state to prosecute, or only possible to prosecute for an ordinary crime will amount to a state's unwillingness to genuinely investigate or prosecute in a *particular* case. As the factors to determine unwillingness in article 17 (2) are exhaustive, the two scenarios would have to amount to one of the situations set forth in (a), (b) or (c) to be considered a situation of unwillingness, and thus lead to admissibility before the Court.

The situations listed in article 17 (2) (b) and (c) can quickly be ruled out. These require an unjustified delay or a lack of impartiality and independence in the proceedings. In the scenario where it is impossible to prosecute, the state declares that it will not commence a prosecution whereas the situations under article 17 (2) (b) and (c) concern proceedings that are either under way or have taken place already. As for the scenario where the state prosecutes for an ordinary crime, there does not have to be an unjustified delay or lack of independence and impartiality just because the state prosecutes an ICC crime as an ordinary crime.

As for subparagraph (a), the Court will have to look for indications of a purpose to shield the person from criminal responsibility. It must still be unwillingness from the state in a particular case, so the key factors would be the intent and the particular prosecution. An example of a case that could fall under subparagraph (a) and thus be admissible before the

court would be if a conduct would fall within the definition of ‘pillage’⁵⁸ as a war crime under the Statute, but the perpetrator was only sentenced for theft in the national judiciary. In such a case, the gravity of the crimes and the sentencing would be so disproportionate that the unwillingness criteria could be triggered,⁵⁹ provided the Court finds an intent to shield the prosecuted.

In the scenario where the state finds it impossible to prosecute the state has conducted a thorough and genuine investigation, but has had to realise that it cannot prosecute as the conduct has not been criminalized in its national legislation. There is therefore no intent to shield the perpetrator in the particular case and the case will not be admissible on this ground. Similarly, in the scenario where a state has prosecuted for an ordinary crime, there is no intention of shielding the accused. In fact, the state is, under this scenario, genuinely attempting to bring the accused to justice pursuant to substantive rules available in its national jurisdiction. The lacking implementation, as such, can not alone determine that the state is unwilling.

In light of the above, we can conclude that the two scenarios under consideration will not render a case admissible to the Court on the basis of it being unwilling to genuinely investigate or prosecute. The lacking implementation, as such, can not alone determine that the state is unwilling.

This does of course not prevent the Court from determining the state unwilling to genuinely investigate or prosecute on other grounds.

5.3 Inability

⁵⁸ Article 8 (2) (b) (xvi) of the Statute

⁵⁹ Kleffner (2003)

The second criteria included in article 17 of the Statute by which the ICC may determine the admissibility of a case is the inability of the state concerned to genuinely investigate or prosecute. What I will seek to establish in this part of the paper is whether the scenario where it is impossible for the state to prosecute, or the scenario where the state prosecutes for an ordinary crime may amount to a situation of inability.

The term ‘inability’ is defined in article 17 (3).⁶⁰ The paragraph sets forth two cumulative criteria. First, there must be a total or substantial collapse or unavailability of the national judicial system, and second, the state must be unable to obtain the accused, the necessary evidence or testimony or otherwise unable to carry out its proceedings. In addition, there has to be a connection between the first condition and the second condition. Only if the collapse or unavailability of the national judicial system causes the inability to carry out its proceedings will the state be considered unable to genuinely investigate or prosecute.

Article 17 (3) reads as follows:

3. *In order to determine inability in a particular case, the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable carry out its proceedings.*

The inability criterion involves, like the unwillingness criterion, a very politically sensitive assessment. By determining unwillingness of the state, the Court will accuse the state of deception and by determining the inability of the state; the Court will pass a qualitative judgement upon the national judicial system. States will avoid both labels if they can, and to maintain the sovereignty of the states,⁶¹ both assessments must be applied most rigorously. As a group of experts set up by the ICC’s office of the Prosecutor has stated:

⁶⁰ The paragraph does not expressly state that it is a definition, but the list is considered exhaustive, and will thus be a definition.

⁶¹ Cassese (2003) page 58.

“The standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards.”⁶²

The situation of inability does, unlike the situation of unwillingness, not refer to a specific case, but rather to the general situation in the state in question.

I will first analyse whether the two scenarios under scrutiny will amount to a collapse or unavailability of the national judicial system.

The idea of collapse refers to failure in the judicial system which prevents it from functioning normally. The concept was inserted to take into account the situations such as a state of chaos due to civil war or natural disasters, or any other event which leads to public disorder.⁶³ Article 17 (3) opens for two different kinds of collapses; both the total collapse and the substantial collapse will be sufficient. Total collapse refers to a situation where there is a breakdown of the judicial system in the whole territory. Substantial collapse on the other hand is a more uncertain term, but at least it requires that there is a considerable impact on the national judicial system

The two scenarios do not fall under those descriptions, and hence does not constitute a case of collapse of the national judicial system. Both scenarios are built on the postulation that the national judicial system is generally effective and there is no armed conflict or any other similar situation to cause the effect which is required to cause a ‘collapse’.

As stated above, the Court has to establish, either a collapse or an ‘unavailability’ in the national judicial system to determine the case admissible before the ICC. I will thus move on to analyse whether the two scenarios will constitute a situation of unavailability for the national judicial system.

⁶² Agirre et al. (2003)

⁶³ Terracino (2007)

There is no agreed definition of the term ‘unavailability of a judicial system’, but it is held by several scholars that it should be given a broad interpretation, so as to cover a wide range of inability scenarios.⁶⁴ Examples of what is suggested that should be included is lack of necessary personnel, judges, investigators or prosecutors, lack of judicial infrastructure, or lack of substantive and criminal legislation.⁶⁵ While the first alternative requirement ‘collapse’ refers to an exceptional situation, ‘unavailability’ refers to more general situations that may be permanent, and which renders the national judicial system unsuitable or incapable of handling proceedings.

The scenario where it is impossible to prosecute clearly falls within the concept of unavailability of the national judicial system. If a state has not implemented or harmonised the definitions of the ICC crimes into its domestic legislation, and for that reason declares that it can not prosecute the case despite investigations, the state’s national judicial system is unavailable. We can therefore conclude that the lack of substantive criminal legislation is an example of unavailability. And furthermore, if there are shortcomings in the legislative framework which makes it impossible to prosecute, the Court may, pursuant to article 17 (3) of the Statute, determine that the national judicial system is unavailable.

Whether the scenario where the state prosecutes for an ordinary crime leads to the national judicial system being unavailable is less clear. If a state decides to prosecute for an ordinary crime because its laws do not contain the Statute’s definitions of genocide, crimes against humanity or war crimes, its judicial system will be unsuitable or inappropriate, while unavailability seems to imply a situation of impossibility. However, the legislative framework in a state that prosecutes for ordinary crimes instead of the ICC crimes might vary from the most comprehensive and pertinent ones to some rather inappropriate ones.

⁶⁴ Agirre et al. (2003)

⁶⁵ Agirre et al. (2003)

Nevertheless, a conclusion regarding the admissibility on the grounds of inability for either of the scenarios can not be reached until after we have analysed article 17 (3) in its entirety. The second condition set up by article 17 (3) is that the collapse or unavailability of the national judicial system has, in a specific proceeding, caused the state to be ‘unable to contain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’. Hence, there has to be a causal connection between the general situation of collapse or unavailability in the national judicial system and the inability of the state to prosecute in the particular case.

Inability to obtain the accused or the necessary evidence and testimony is relatively easy to establish for the Court. However, during the drafting of the Statute, some delegations were concerned that only including that criteria as a basis for inability could limit the Courts capacity to act and thus prevent the overriding aim of the Statute. As a result, they added the phrase “or otherwise unable to carry out its proceedings”, and thus lowered the threshold for determining inability.

In the impossible to prosecute scenario, it is clear that the state is unable to prosecute, and that inability is directly derived from the unavailability of the national judicial system. As a result, we can conclude that in a case where the state declares that it can not prosecute the alleged perpetrator, because it has not criminalized the certain conduct which is within the definition of an ICC crime, the Court would be able to admit that case on the basis of a state’s inability to genuinely prosecute.⁶⁶

As for the prosecution for ordinary crimes scenario, it is equally clear that it does not fulfil the second condition for determining the inability of the state to genuinely prosecute. By prosecuting for ordinary crimes, the state is carrying out proceedings, and is thus not unable to do exactly that. It will therefore not matter, in the inability criterion, at what level

⁶⁶This has also been claimed by several scholars such as Terracino (2007) and Kleffner (2003). The claim was however seemingly disputed by Colombia in their declaration made upon ratification: “Colombia declares that the use of the word ‘otherwise’ with respect to the determination of the State’s ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.” (source: <http://www.icrc.org/ihl.nsf/NORM/909EEAAE157FBD43412566E100542BDE?OpenDocument>)

of comprehensives and pertinence the national judicial system is at. As long as the state prosecutes the same conduct which would constitute an ICC crime for an ordinary crime, at whatever gravity, the case will not be admissible before the Court by this criterion. Consequently, the scenario where states prosecute for ordinary crimes will not result in a situation where the Court would be able to admit the case on the basis of a state's inability to genuinely prosecute.

In sum, the scenario where it is impossible for the state to prosecute would, pursuant to article 17 (3) of the Statute, amount to inability of the state to genuinely prosecute. The prosecution for ordinary crimes scenario however, will not, pursuant to article 17 (3) of the Statute, amount to a situation where the state is unable to genuinely prosecute.

I will therefore move on to analyse whether the prosecute for ordinary crimes scenario still could provide situations where the case would be admissible before the Court, or if the principle of *ne bis in idem* prevents that from occurring.

5.4 *Ne bis in idem*

The principle of *ne bis in idem* is found in different forms in different systems, but it has the same function, namely to prevent a person being prosecuted for the same conduct twice. While the 'horizontal' *ne bis in idem* principle refers to the relationship between two states, the 'vertical' *ne bis in idem* principle refers to the situation between national courts and international tribunals.⁶⁷ The relevant side of the principle for this paper is the vertical side of the principle, when a national court has acquitted or convicted the person.

⁶⁷ Van den Wyngaert (2002) page 708 and 709. The same relationships are referred to as the 'internal' *ne bis in idem* principle and the 'international' *ne bis in idem* principle in Cassese (2003) page 319.

This side of the principle is reflected in article 20 (3) of the Statute. Accordingly, I will have to assess whether the Court can find the case, which has already been prosecuted in national judicial systems as an ordinary crime, admissible. Otherwise, the national proceedings will be considered final.

Article 20 (3) reads as follows:

3. *No person who has been tried by any other court for conduct also prescribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

(a) *Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*

(b) *Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

The first question which needs to be addressed is whether the national proceeding of an ordinary crime will amount to a proceeding by the standards of article 20 of the Statute. Only then will the principle of *ne bis in idem* be relevant. This question must be answered affirmatively. In the scenario where a state prosecutes for an ordinary crime, a thorough national investigation and prosecution has taken place for the same conduct, but of an ordinary crime rather than an ICC crime.

The Court will thus only be able to admit a case under this scenario if the national proceeding falls within one of the exceptions under article 20 (3) of the Statute.

The exceptions contained in article 20 (3) refer to the same conditions as provided for in the unwillingness criterion in article 17 (2) (a) and (c). I have already established that none of the alternatives in article 17 were applicable for this scenario. They require an intent from the state to shield the alleged perpetrator, and that is not the case in the scenario where the state decides to prosecute for an ordinary crime. A situation where a national prosecuting for an ordinary crime could fall within the exceptions of article 20 (3) would be if the conduct would fall within the definition of genocide of the ICC Statute, but the national prosecution was for assault. The national charge must manifestly not conform to the conduct before the Court will determine such an intent to exist, and this is not the postulation which the scenario is based on.

The drafting history behind article 20 (3) of the Statute also confirms the interpretation that prosecuting for ordinary crimes does not amount to one of the exceptions listed in that article. A national prosecution for ordinary crimes would not prevent the ICTY or the ICTR from determining the case admissible according to their Statutes article 10 (2) (a) and 9 (2) (a) respectively. This procedure was also suggested continued with the ICC by the ILC Draft Statute article 42 (2) (a). However, such a rule proved highly controversial and disputed in the drafting work. Some delegations feared that the accused could be prosecuted twice simply because of the categorization of the criminalized conduct. As a result, in 1998 the Preparatory Committee deleted the suggestion.

Consequently, a prosecution for an ordinary crime within the national judicial system must be considered a finalised proceeding preventing a second trial on the basis of the *ne bis in idem* principle. And furthermore, none of the exceptions pursuant to article 20 (3) of the Statute will apply. In fact, as it was expressly excluded as an exception, we can establish that the Court would not be able to prosecute an accused after he or she was prosecuted in national jurisdictions for ordinary crimes without violating the principle of *ne bis in idem*.

6 The impact of complementarity on national implementation

I have now shown how different strategies of national implementation chosen by the States influence the admissibility before the Court. In this part, I will apply the conclusions reached in the previous parts and analyse how the principle of complementarity influences the states choice of implementation strategy.

To sum up, what I have shown in the previous parts is that states implement the ICC crimes into their substantive law as the principle of legality would otherwise prevent them from enforcing the prosecution of these crimes. If states decide not to implement, they risk finding themselves in the scenario where it is impossible for them to prosecute a case which falls within the definition of one of the ICC crimes. This means that the ICC will have jurisdiction over the case and it will be determined admissible before the Court due to the states inability to prosecute.

It is therefore imperative that the States Parties to the Rome Statute take into consideration the possible scenarios they could encounter if they do not implement when revising their criminal codes. If they decide to implement the ICC crimes word for word, or even expand the scope of the international crimes, there will be no problem with the legislation as such. If, however, the states decides to implement a more narrow definition of the ICC crimes, or not implement the ICC crimes at all, they will be in the same situation as presented under part 4.3 and 4.4 of this paper. Hence, they will most probably face a scenario where they are able to prosecute for an ordinary crime, but they may also be faced with the scenario where it is impossible for the state to prosecute as the act is not criminalized at all in its national judicial system. These scenarios will therefore be relevant, and I will continue to use them in this part.

First I will briefly explain how the complementary nature of the ICC works as an incentive for states to implement the ICC Crimes into their national legislation. I will then move on

to discuss whether or not states are obliged by the complementary nature of the Court to implement the ICC crimes.

6.1 Complementarity as an incentive to implement the ICC crimes.

The principle motivation underlying the complementary regime of the Statute is to respect state sovereignty as much as possible,⁶⁸ and the most significant way complementarity works as an incentive for States Parties to implement the ICC crimes into their national legislation, is their wish to prevent an international body from interfering with their sovereignty.

It is uncontested that the jurisdictional function (the function of *jus dicere*, ‘to tell the law’), either civil or criminal, is considered an important part of a state’s sovereignty.⁶⁹ Unless the States Parties implement the ICC crimes, they risk finding themselves in the scenario where it is impossible to prosecute. They will be obliged to surrender their own nationals to the Court, even if the person has not violated any national criminal code.⁷⁰ States Parties wishing to safeguard their sovereignty will thus have a clear incentive to implement the ICC crimes.

This incentive has clearly motivated several states. One of the objectives for implementing the ICC crimes into the German domestic law was

“(...) to ensure, in the light of the complementary prosecutorial competence of the International Criminal Court, that Germany is always able to prosecute crimes within the jurisdiction of the ICC (...)”.⁷¹

⁶⁸ Cassese (2003) page 351.

⁶⁹ Goia (2006) page 1096.

⁷⁰ Cf. part 9 of the Statute.

⁷¹ Translated by Kleffner (2003). Original document is found at: <http://www.bmj.bund.de/files/-/143/Einfuehrung%20Voelkerstrafgesetzbuch.pdf>. Norway has also found this incentive as a major reason to implement the ICC crimes stating that: “For kommisjonen har det vært avgjørende at man ved å innføre egne

Implementation in this way will also benefit the states by strengthening their national criminal justice system by promoting conformity with other international obligations and bringing them up to date with important developments in international law. Even third party states appreciate this part of the complementary nature of the ICC. The Department of Treaty and Law of the Chinese Ministry of Foreign Affairs has noted that the “most important role of the International Criminal Court is expressed in that it promotes all countries to improve their domestic judicial systems”.⁷²

Another reason why the individual state will want to secure jurisdiction over the international crimes is to secure the success of the ICC in ending impunity for the perpetrators of ICC crimes. The total capacity of the Court does not match the potential number of ICC crimes. In the 2004 budget for the ICC, the assumption adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court (Assembly) was that the Court would have a constant docket of three cases, and it would not reach this number before 2010.⁷³ Today there are four cases before the ICC⁷⁴, and projections seem to indicate that the number is more likely to increase than to decrease. The states may thus aid the Court by relieving the Court of the majority of cases.

Lacking or non-existing implementation, which may lead to more cases being brought before the Court, and thus strains the budget of the Court, will also work as an incentive for States Parties to implement in other ways. First, it is in the interest of all states that the prosecutor of the ICC (Prosecutor) acts independently so as to maintain his integrity. Recent developments show that the Assembly has made budgetary determinations which may question the independence of the Prosecutor. For example, the Assembly made cuts in

straffebud som dekker art 6, 7 og 8 i Roma-vedtektene, unngår at det blir stilt spørsmål ved norske myndigheters vilje eller evne til strafforfølgning på dette området.” NOU 2002: 4 Ny straffelov kapittel 9.2.

⁷² See *China and the International Criminal Court*, Department of Treaty and Law (MFA). Available at <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm> (last visited October 2007) China has not signed the Statute.

⁷³ O’Donohue (2005)

⁷⁴ <http://www.icc-cpi.int/cases.html>

the Jurisdiction, Complementarity and Cooperation Division which the Prosecutor established in 2004.⁷⁵ A less strained budget would perhaps grant the Prosecutor more independence. Furthermore, as a clearer incentive, it is the States Parties which cover the expenses incurred by the Court, and it will be less expensive in the long run for each State if the most possible number of cases are tried at a national level.

States may also wish to secure national jurisdiction over the ICC crimes as the national judicial organs might be better equipped to try a particular case due to their connection with the perpetrator, the location etc. A state which finds itself in the scenario where it is impossible to prosecute, will not have the possibility to assess this possible advantage. Furthermore, by implementing, the state will in fact have an option as to whether the national judicial organs or the ICC is better equipped to consider the case, as States Parties have the possibility to refer cases to the Court according to article 14 of the Statute.⁷⁶ This is, however, an uncertain option at best as there is no guarantee that the Prosecutor will consider the case to hold sufficient gravity pursuant to article 17 (1) (d), nor have the capacity to handle it.

Before hearing a case, the Court will have to determine whether or not the case is admissible before the Court.⁷⁷ In regard to the scenario where it is impossible for the state to prosecute, I have shown in part 5.3 that a case will be admissible as the State Party will be 'unable' to carry out a genuine prosecution. This represents another incentive for States Parties to implement the international crimes into their judicial system. Any state will seek to avoid having their judicial system being labelled 'unable' to carry out prosecutions for the most heinous crimes known to mankind.⁷⁸ This is an incentive that is specific to the complementary principle as a primary international jurisdiction would have priority regardless of the adequacy of the national effort.

⁷⁵ O'Donohue (2005)

⁷⁶ See for instance ICC-01/04-01/06 The Prosecutor v. Thomas Lubanga Dyilo

⁷⁷ Cf. Article 17 of the Statute.

⁷⁸ Benzing and Bergsmo refer to this as the 'Embarresment factor'. Benzing, 2004.

An incentive for States Parties to implement the ICC crimes instead of relying on its existing criminalized ordinary crimes is through the understanding that e.g. an act of genocide should be labelled as genocide and punished accordingly. Prosecuting a case of genocide as a murder case should not be considered an adequate solution. In the transferral case *Prosecutor v. Bagarzarga* of 19. May 2006 held by the International Criminal Tribunal for Rwanda, Norway requested a case of genocide transferred from the ICTR and to Norwegian courts. The ICTR did not consider the Norwegian judicial system adequate as the case would have to be tried as a murder case in Norway due to Norway's lacking implementation of ICC crimes.

Such a national proceeding would, however, not make the case admissible before the ICC. Despite having a poor solution legislation wise, the state would still not be considered unwilling or unable to genuinely prosecute pursuant to article 17 of the Statute. Assuming that states wish to label and punish the ICC crimes according to the gravity of the conduct, this should still be a clear incentive for states.

Finally, it must be recognised that the social and political reconciliation process in the aftermath of a conflict, which has included violations of ICC crimes, will be very delicate and vulnerable. Whether an international or a national prosecution will serve the purpose of justice and reconciliation best will depend upon the situation.⁷⁹ States which have implemented the ICC crimes will be able to decide whether to prosecute the case domestically or try to refer it to the Court pursuant to article 14 of the Statute states which find themselves in the scenario where it is impossible to prosecute, however, will only see the perpetrators punished if the case is brought before the Court.

⁷⁹ Berkeley scientists Eric Stover and Harvey Weinstein illustrate this in their selected studies regarding the nationals of Rwanda and Former Yugoslavia and their faith in the ICTR and ICTY respectively. Their conclusion is that in Rwanda especially, the national population has much confidence in the national judicial system, but very little confidence in the ICTR. Stover (2004).

6.2 National implementation of ICC crimes as a legal obligation

In light of the aforementioned reactions of states to the complementary nature of the ICC and the importance of national implementation of international crimes, the question arises as to whether there is an obligation for States Party to implement the ICC crimes into their national legislation.

The mandate of the drafters of the Rome Statute was to build on existing international law; not develop new penal provisions, only codify custom. The ICC crimes were therefore recognised as international law even before the Statute was adopted and entered into force. For some of these, a clear obligation to implement the ICC crimes into domestic legislation can be derived from various treaties,⁸⁰ while customary laws may impose such an obligation for others. The Statute leaves these obligations intact as it does not limit or prejudice any existing international law.⁸¹

The Statute does not expressly require States Parties to implement the ICC crimes into their domestic penal code. This is in contrast to many other conventions which concern criminal conduct.⁸² What I seek to assess in this part of the paper is whether the principle of complementarity ‘in itself’⁸³ imposes such an obligation. This would be an obligation to implement the crimes described in articles 6 through 8 in the Statute, regardless of whether the state has ratified the other treaties which introduces similar obligations.

⁸⁰ For the crime of genocide: Article V of the 1948 Genocide Convention; for war crimes: Articles 49, 50, 129 and 146 of the Four 1949 Geneva Conventions and Articles 85-87 of the 1977 First Additional Protocol to the Geneva Conventions; for some of the crimes against humanity: Article IV of the 1973 Apartheid Convention and Article 6 of the UN Torture Convention.

⁸¹ Cf. Article 10, the Statute.

⁸² An example could be the United Nations Conventions against Transnational Organized Crime (2000)

⁸³ By the principle of complementarity ‘in itself’ I mean the nature of the principle as it is presented in the Statute. The conclusion will therefore be based upon an interpretation of the parts of the Statute which concern the principle of complementarity. Other grounds for a possible obligation fall outside the scope of this thesis. See for instance Goia (2006) where he claims an obligation exists as an ‘erga omnes’ or ‘community obligation’.

As shown above in Part 4.1, national implementation of the ICC crimes will ensure national jurisdiction over the crimes which is essential for the principle of complementarity. Unless complementarity establishes such an obligation, States Parties are free to choose not to implement the ICC crimes, while they at the same time have granted jurisdiction to the Court. They would thus face the two scenarios presented in part 4.3 and 4.4, namely the scenario where the state prosecutes for an ordinary crime instead of the ICC crime and the scenario where the state finds it impossible to prosecute due to the lack of applicable ordinary crimes.

It must be noted that the States Parties have to a large extent responded to their ratification of the Statute by implementing the ICC crimes into their national judicial system⁸⁴. This is an evident eagerness to fulfil the principle of complementarity.

Some states have in their process of implementing the ICC crimes expressly claimed that it is a part of their obligation derived from the Statute.⁸⁵ Other states however, have stressed that their ratification of the Statute did not incur any obligations to alter their jurisdiction.⁸⁶ Also academic writers have different views regarding this question.⁸⁷

⁸⁴ See part 4 of this paper..

⁸⁵ For an example of *opinio juris* pro an obligation see the Dutch Explanatory Memorandum (*Memorie van Toelichting*) on the substantive implementing legislation (Wet Internationale Misdrijven) which has been translated by Kleffner (2003) into: 'Although not expressly provided for in the Statute, the majority of States – including the Kingdom – were always of the opinion that the principle of complementarity entails that States parties to the Statute are *obliged* to criminalise the crimes that are subject to the International Criminal Court's jurisdiction in their national laws and furthermore to establish extra-territorial, universal jurisdiction which enables their national criminal courts to adjudicate these crimes even if they have been committed abroad by a foreign national.' Source: Kamerstukken II 2001/02, 28 337, nr. 3 (MvT) pp. 2 and 18. (Emphasis added)

⁸⁶ *Opinio juris* contra an obligation held by States party to the Statute include Spain cf. the Spanish Progress Report on ratification and implementation of the Rome Statute to the Council of Europe delivered in 2001: '[...] strictly speaking, the statute does not include any obligation on the part of the States parties to incorporate those criminal provisions into their internal law, as they only concern the scope and exercise of the jurisdiction of the Court.' *SOURCE* Also France and Belgium have expressly rejected that implementation of the substantive law is an obligation after the Rome Statute. *SOURCE*

⁸⁷ Contra an obligation to implement see for instance: Hay (2004) or Robinson (2002). For the opposite view, see for instance: Roscini (2007), Yang (2005), Sluiter (2004), Relva (2003) and Philips (1999).

As stated in part 2.2, the codified principles of treaty interpretation as presented articles 31-33 of the 1969 Vienna Convention on the Law of Treaties will be relevant when interpreting the provisions of the Statute which relates to the principle of complementarity. The Vienna Convention will thus be the basis for my interpretation and conclusion in this part.

In compliance with the Vienna Convention article 31 (1), any interpretation of an international treaty should start with the wording of its approved text. And as stated above, no clear and express obligation is provided for in the Statute. This absence militates against the existence of such an obligation. So does the fact that the Statute states express obligations on States Party to implement cooperative legislation and to criminalize offences against the administration of the justice in its articles 70 (4) (a) and 88.

However, the absence of an express obligation from the treaty text can not be the determining factor alone. There is no rule or principle of international law that prohibits implied obligations to be inferred from a treaty text. On the contrary, there are several examples where international courts or quasi-judicial organs have deduced obligations as a necessary consequence of a treaty text.⁸⁸ As for the national implementation of the ICC crimes, there are several arguments that support that the complementarity principle implies an obligation to implement the ICC crimes.

(1) Contextual interpretation

The first argument in favour of an obligation on states to implement the ICC crimes is the contextual interpretation of the provisions of the Statute regarding the complementarity principle. Article 31 of the Vienna Convention lists the contextual interpretation (“in their context”) as an essential aspect of treaty interpretation, together with the ordinary meaning of the text and the teleological interpretation (“in light of its object and purpose”).

⁸⁸ Kleffner (2003). One typical example is the doctrine of implied powers as developed with respect to the powers of international organisations.

The term ‘context’ includes, according to article 31 (2) of the Vienna Convention, in addition to the surrounding text, the treaty’s “preamble and annexes”. The preambular paragraph 6 of the Rome Statute recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This duty can however, only be carried out if the state has established jurisdiction to prosecute for the particular conduct. This duty will be achieved through the scenario where the state prosecutes for an ordinary crime, but it will not be achieved in the scenario where it is impossible for the state to prosecute.

The only way to secure that no States Parties experience the scenario where it is impossible for them to prosecute, and thus cannot fulfil their duty after preambular paragraph 6, is thus to interpret complementarity as an obligation for states to implement the ICC crimes into their national legislation.

(2) Teleological interpretation

A teleological interpretation of the complementarity provisions equally supports this conclusion. Article 31 (1) of the Vienna Convention identifies a treaty’s object and purpose as an important interpretational factor. The primary source for finding the object and purpose of a convention such as the Rome Statute is, according to article 31 (2) of the Vienna Convention, the preambular clauses.⁸⁹

The Statute affirms in its preamble paragraph 4 “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. This acknowledges the fact that the Court neither practically nor politically will be able to handle all future international crimes. Preamble paragraph 5 goes

⁸⁹Regarding the relevance of the Preamble the ECHR noted in *Golder v. The United Kingdom* para. 34 that “the Preamble is generally very useful for the determination of the ‘object’ and ‘purpose’ of the instrument to be construed”.

on to confirm that the objective of the ICC supplemented by effective national prosecutions is to achieve the ultimate purpose of putting an end to impunity for the perpetrators of international crimes, and thus prevent these crimes from being committed.

In light of the abovementioned objects and purposes of the ICC, the assertion found in Preambular paragraph 10 that the ICC “shall be complementary to national criminal jurisdiction” can only be interpreted as the establishment of a system of criminal law enforcement which places the primary responsibility upon the States Parties. In a system like this, the very objective can only be achieved if the prosecutions have the necessary deterrent effect. This effect will be undermined if states decide not to implement the ICC crimes so as to fully criminalise conduct punishable under the Statute.

If several states decided not to adequately implement the ICC crimes and thus experience the scenario where it is impossible for the state to prosecute, the Court will (due to its limited capacity) have to confine itself to a rather restricted number of cases, and it will not be able to rely on enforcement through states. The crimes in question are typically committed at a level and scale which involves a considerable number of perpetrators. Unless an effective national enforcement mechanism is in place, the prosecution would probably appear random and the deterrent effect of the ICC would be diminished and the purpose of the Statute would be undermined.

The deterrent effect of the international criminal law will also be undermined if states decide to use their ordinary crimes for future cases of violations of ‘genocide’, war crimes’ and ‘crimes against humanity’.

For example, if a case of genocide was prosecuted before Norwegian courts today, the perpetrator would have to be prosecuted for ordinary crimes such as murder or assault and battery depending upon the situation. Not only are the offences of far less gravity, but the

possible sentencing might not match the gravity of the case and the perpetrator's criminal liability will be obsolete after 15 or 25 years⁹⁰.

Furthermore, an absent or inadequate national legislation would run counter the complementary nature of the ICC. The ICC can only be effective as a complementary judicial organ if the majority of State Party implement the Statutes substantive law to the extent that is required for the purpose of national prosecution. If no obligation to implement the ICC crimes exists for the State Party, the Court might in fact become the court of first instance, in addition to being the only one, instead of being a permanent reserve court as envisaged by the principle of complementarity. Comprehensive national implementation of international crimes is therefore an indispensable element for the principle of complementarity to function efficiently.

If all States Parties did, in fact, implement the ICC crimes into their national legislation, they would still have to genuinely investigate and prosecute the particular case in order prevent cases being admissible before the Court. An obligation to implement would, thus, not necessarily mean that the Court would be redundant. It would still have a deterrent effect upon states to investigate and prosecute its crimes genuinely. Furthermore, the success of the Court should not be measured by how many cases it exercises jurisdiction over itself, but rather by how seldom perpetrators of these crimes achieve impunity.⁹¹

It can therefore be argued that to interpret the provisions on complementarity so as to give them the fullest weight and effect consistent with the ICC's functions involves an obligation on States Parties to secure national jurisdiction to the extent which is required for the purpose of national prosecution.

However, it is only in the scenario where the states find it impossible to prosecute as they have not criminalized the conduct at all which will necessarily contradict the object and

⁹⁰ The Norwegian Criminal Code section 67.

⁹¹ Paragraph 5 of the preambular clauses.

purpose of the Statute. And it must be acknowledged that this scenario will occur much less frequently than the scenario where the state prosecutes for an ordinary crime.

Perpetrators of international crimes in the latter scenario will be prosecuted regardless of an implementation process. The scenario where states prosecute for an ordinary crime will therefore not contradict the principle of complementarity in most cases. Nevertheless, prosecution for ordinary crimes will seldom reflect the gravity of the acts performed by the perpetrator and must for that reason not be viewed as a preferable situation.

States which have to prosecute for ordinary crimes can combat this by the way the courts formulate their grounds for the judgement. Again, if Norway had to deal with a case of genocide, it would be prosecuted and punished as murder. However, there is nothing preventing the judges from stating, in the judgement, that what has really taken place is a case of what is internationally labelled as 'genocide'. This would be an aggravating factor when meting out the severity of the punishment according to Norwegian law. Other States will have similar opportunities.

The teleological interpretation still favours an obligation to implement the ICC crimes, but the possibilities within the scenario where states prosecute for ordinary crimes somewhat downplays the strength of the argument.

(3) Subsequent practice

Another argument in favour of an obligation for States Parties to implement the ICC crimes is the subsequent practice of the states. Vienna Convention article 31 (3) (b) states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account when interpreting a treaty.

The preparatory works to the Vienna Convention contained the term 'understanding' rather than 'agreement' and this alteration occurred only to adjust the wording in accordance with

the other language versions of the treaty, rather than to give the expression a different meaning. It is therefore maintained that a consensus that does not amount to a legally binding agreement could still be an interpreting factor.⁹²

In the case of the implementation of the ICC crimes, the subsequent practice has been that approximately 70 % of the States Party have already, or are in the process of, implementing the ICC crimes into their domestic legislation. The trend is also clear that when a state Party implements its cooperative legislation as it is expressly obliged to in accordance with the Statute's article 88,⁹³ the state also implements or begins to implement the international crimes into its substantive legislation. This has been the subsequent procedure of 67 out of the 71 states that have implemented or begun implementing the cooperative legislation, and the work has been given a high priority.

The subsequent procedure must therefore be considered strong enough to constitute a uniform consensus that the ICC crimes must be implemented. This supports the argument that complementarity should be interpreted as establishing an obligation for States Party to implement the ICC crimes into their national legislation.

(5) Conclusion

Despite the significant number of strong arguments in favour of an obligation for States Parties to implement the ICC crimes can be derived from the complementary nature of the ICC, the conclusion will ultimately depend upon whether one favours a more textual or a more purposive interpretive approach. I favour the more textual interpretive approach, and do not believe that states are obliged to implement the ICC crimes. The terms of a treaty are by far the most important source for interpreting the treaty, and an obligation for States Parties to alter their legislation should be expressly stated. Furthermore, the subsequent practice of implementing the ICC crimes has not been identical among states, as different

⁹² Kleffner (2003) footnote 26 with further references.

⁹³ Article 88 of the Statute expressly states that all States Party are obliged to implement cooperative legislation in accordance with part 9 of the Statute. Whether this constitutes an obligation is not disputed.

strategies have been used. As I have shown in part 4 some States Parties have implemented a more restricted definition than in the Statute, while others have implemented the exact definition or even expanded it. If one then were to conclude that an obligation to implement the ICC crimes follows from the principle of complementarity, the exact content of this obligation would be uncertain.

Also, I have concluded that to prosecute for ordinary crimes at national level does not in and of itself warrant the finding of a case admissible. It would therefore be artificial to interpret an implicit obligation out of a principle, which demands more than the standard set forth by the same principle.

Furthermore, accession states are not required to implement the ICC crimes before they become parties to the Statute. In fact, the best thing that could happen to the ICC would be that all states of the world ratified the Statute and thus agreed to put an end to impunity for the perpetrators of the worst crimes known to mankind, regardless of the level of national criminal legislation. And in that respect, the complementarity principle will have a bigger impact in states which have a poor criminal judicial system.

Nevertheless, even if the principle of complementarity does not imply an obligation for States Parties to implement the ICC crimes as defined in the Statute, the incentives as described in part 6.1 remain relevant. This should encourage states to go through with an implementation process, so as to secure their jurisdiction over these crimes. Considering the rate at which States Parties are implementing the ICC crimes, the question as to whether an obligation does exist, may over time become superfluous.

7 Concluding remarks

Studies into national implementing processes show that states which ratify the Rome Statute are likely to begin implementing the ICC crimes into their national legislation, aspiring to avoid a situation of unwillingness or inability to prosecute ICC crimes. An adequate implementing process which closely follows the definitions of the Statute will secure the state criminal substantive jurisdiction to prosecute the same crimes as the ICC.

However, some States Parties have not yet implemented one, or more, of the ICC crimes into their national legislation, while others have defined the ICC crimes under the national law in narrower terms than provided for by the Statute. As this paper has shown, if these states wish to prosecute and punish persons for violating conduct described in an ICC crime, they will face one of two scenarios. Most probably, they will be able to prosecute for an ordinary crime which covers the same conduct. Alternatively, they might find it impossible to prosecute as they lack the substantive jurisdiction to prosecute nationally.

As argued throughout this paper, the scenario where the state prosecutes for an ordinary crime will not be admissible before the Court. It does not, in itself, constitute unwillingness nor inability of the state to genuinely prosecute, and hence, due to the principle of *ne bis in idem*, the Court will not determine such a scenario admissible.

Any case under the other scenario, where the state finds it impossible to prosecute, will on the other hand amount to the state being unable to genuinely prosecute pursuant to article 17 of the Statute. The Court would thus determine the case admissible.

This then answers two of the questions asked in the introduction. For a state to maintain its jurisdiction and thus avoid failing the admissibility test, it would suffice to criminalize the same conduct as defined in the Rome Statute. The state does, in regard to the admissibility assessment, not have to implement own provisions criminalizing ‘genocide’, ‘war crimes’ and ‘crimes against humanity’ as long as the particular conduct is criminalized elsewhere.

States with the most meticulous criminal legal systems are therefore likely to maintain substantive jurisdiction even without an implementation process. Most states will, however, have to make adjustments in their criminal legislation.

It should be mentioned again that in a real case, the admissibility test would look at more factors than the national legislation which could result in a case being admissible even if the state prosecuted for an ordinary crime.

The paper has also argued that the principle of complementarity does not imply an obligation upon States Parties to implement the ICC. This was the third question asked in the introduction. It is therefore neither a need nor an obligation for the States Parties to implement the ICC crimes into their national legislation, in regard to the principle of complementarity.

The paper has, however, discussed why a state should still implement the ICC crimes despite the aforementioned conclusions.

Only through an adequate national jurisdiction secured through their legislation will the international criminal judicial system achieve the necessary deterrent effect. The Court will only be able to handle a fraction of all future cases of violations to the ICC crimes. It is therefore imperative that the states prosecute international crimes in their own national judicial systems. And as shown, this can only be done through adequate national jurisdiction secured through their legislation.

It must be acknowledged that although prosecutions of ordinary crimes will put an end impunity for the perpetrators of the ICC crimes. But the ordinary crimes might be of far lesser gravity. Thus, the scenario where the state prosecutes for an ordinary crime is not a desirable one.

It is therefore in the interest of both the single state as well as the international criminal justice system that the state implements the ICC crimes regardless of whether an obligation to do so exists.

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